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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TINA LASHAWN BROWN,

Defendant and Appellant.

B291376

Los Angeles County

Super. Ct. No. TA143442

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Schultz, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

In a court trial, defendant and appellant Tina Lashawn Brown was convicted of assault with a semiautomatic firearm. The trial court also found true enhancements for personal infliction of great bodily injury and personal use of a firearm. Brown contends on appeal that the conviction for assault with a semiautomatic firearm and the enhancement for personal infliction of great bodily injury are not sufficiently supported by her acts of pointing a loaded firearm at the victim and firing shots at the ground. Brown alternatively contends the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancement in light of the amendment of Penal Code section 12022.5 by Senate Bill No. 620. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts

On April 22, 2017, Brown arrived late for a car detailing appointment she had with Darrell Adams (Adams) at a coin-operated carwash. Adams washed Brown's car free of charge, as he had agreed on the previous day. When Adams began to leave for another appointment, Brown asked if he would vacuum her car. Adams refused, and continued to walk across the street to his parked bicycle.

Brown drove her car to where Adams was unlocking his bicycle. Brown got out of her car and drew a .25-caliber semiautomatic pistol from her chest area. As Brown walked toward Adams, she pointed the gun at him. Adams asked her what she was going to do with the gun. Brown did not respond. She pointed the gun down, and fired two shots. After the first shot, Adams turned away from Brown, who fired a second time.

The second shot hit Adams in his right calf and he fell. Brown left the location after she fired the shots.

A surveillance video camera captured the event. The trial court admitted the recording into evidence.

A man named Johnnie Wallace also saw Brown fire two shots at Adams. Wallace heard the second shot hit the ground and then saw Adams spin around and holler that he was shot. The second shot ricocheted off the ground and struck Adams in the calf. Wallace saw that Adams was injured, so he called 911.

An ambulance arrived and transported Adams to a hospital. Adams had surgery for the gunshot wound. Adams remained at the hospital for three days. He returned to the hospital for a second surgery because he developed a blood clot. Adams remained at the hospital for an additional three days. During his recovery from the injury, Adams used crutches for about one month.

2. Procedure

Brown waived her right to a jury trial. The trial court found Brown guilty of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b); count 1),¹ and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3). The trial court additionally found that Brown personally used a firearm (§ 12022.5, subd. (a)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court granted Brown's motion for judgment of acquittal as to the charge of attempted murder (§ 664/187, subd. (a); count 2). The trial court also found the strike prior conviction and serious felony prior conviction allegations not true.

¹ All further undesignated statutory references are to the Penal Code.

On June 14, 2018, the trial court sentenced Brown to an aggregate term of 15 years in state prison. As to count 1, the trial court imposed the upper term of nine years. The trial court imposed the low term of three years for the firearm enhancement under section 12022.5, subdivision (a), and an additional three years for the great bodily injury enhancement under section 12022.7, subdivision (a). As to count 3, the trial court imposed the middle term of two years, and stayed that sentence under section 654. Brown was given a total of 421 days of custody credit.

Brown filed a timely notice of appeal.

DISCUSSION

1. *Sufficiency of Evidence*

Brown argues that the record contains insufficient evidence to support the conviction for assault with a semiautomatic firearm and the sentencing enhancement for inflicting great bodily injury.

Our standard of review is well settled. “ ‘ “When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.” ’ ” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054–1055 (*Nguyen*); *People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*); *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) “ ‘ [I]t is the [trier of fact], not the appellate court which must be convinced of the defendant’s guilt.’ ” (*Nguyen*, at pp. 1055–1056.) We apply the same standard of review on a

challenge to the sufficiency of the evidence of an enhancement as to the sufficiency of the evidence of a conviction. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057–1058; *People v. Wilson* (2008) 44 Cal.4th 758, 806.)

“A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” ’ the verdict.” (*Zamudio, supra*, 43 Cal.4th at p. 357; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) “[We] must presume in support of the judgment the existence of every fact [the trier of fact] could reasonably . . . deduce[] from the evidence. [Citation.]” (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.) “If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Jennings* (2010) 50 Cal.4th 616, 638–639 (*Jennings*).)

a. Assault with a Semiautomatic Firearm

An assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) Section 245, subdivision (b), specifically makes it a crime to commit an assault with a semiautomatic firearm. (§ 245, subd. (b).) Assault “requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.” (*People v. Williams* (2001) 26 Cal.4th 779, 790 (*Williams*).) A defendant need only be aware of the facts that would lead a reasonable person to realize that a battery, or some form of physical force, “would directly, naturally and probably result from his conduct.” (*Id.* at p. 788.)

Brown argues that no reasonable person would realize that Adams would have been struck by a shot fired at the ground, rather than directly at him. Brown relies on the trial court's dismissal of the attempted murder charge to support her argument. The trial court reasoned that because Brown fired shots at the ground, and not directly at Adams, she lacked the specific intent to kill required for attempted murder.²

This reasoning cannot apply to the offense of assault under the circumstances of this case. Assault does not require a specific intent to injure a victim. (*Williams, supra*, 26 Cal.4th at p. 788; *People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1352 (*Trujillo*).) "Because the gravamen of assault is the *likelihood* that the perpetrator's action will result in a violent injury to another, it follows that a victim of assault is one for whom such an injury was likely." (*Trujillo*, at p. 1355.) The perpetrator "need not be subjectively aware of the risk that a battery might occur." (*Williams*, at p. 788.)

Brown's act of shooting would likely result in injury, regardless of whether she intended to cause the injury, and

² In finding that Brown did not have the specific intent to kill, the trial court considered, among other evidence, the testimony of Humphrey Hyoung, an LAPD Detective who was a firearms expert. According to Hyoung, when shots are fired lower than the specified target, either the shooter involuntarily pointed the firearm down and missed the target, or she deliberately pointed the firearm in a downward direction to avoid hitting the target. The trial court determined that the placement of Brown's shots at the ground was circumstantial evidence to support either Brown's intent to kill or lack of intent to kill. The trial court adopted the latter theory, and concluded that Brown did not have the intent to kill.

regardless of whether she subjectively appreciated this likelihood. The evidence is undisputed that Brown shot in Adams's direction, rather than away from him. Even though Brown fired the shots at the ground, she still fired them in Adams's direction at close range. Any reasonable person would realize that firing multiple shots toward the ground would "directly, naturally and probably" strike anyone standing in the immediate area, either directly or by ricochet. (*Williams, supra*, 26 Cal.4th at p. 788, fn. 3.) These facts sufficiently support the conviction for assault with a semiautomatic firearm.

We also reject Brown's contention that her act of pointing the firearm at Adams did not amount to assault. "To point a loaded gun in a threatening manner at another . . . constitutes an assault, because one who does so has the present ability to inflict a violent injury on the other and the act by its nature will probably and directly result in such injury." (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269.) Brown characterizes her act of pointing the firearm as non-threatening. She minimizes her combined actions of chasing down Adams, getting out of her car, drawing her firearm and pointing it at him. Brown continually pointed the firearm at Adams from when she exited her car to immediately before she fired the shots. She pointed the firearm at the ground only when she fired it. The entirety of the record demonstrates that Brown's pointing her loaded firearm was threatening, and reasonably justifies the trial court's finding of guilt on the assault charge.³

³ The trial court commented, "I don't think as a matter of law that every time you point a firearm at someone it is an assault with a firearm." It is true that pointing, or threatening to shoot, an unloaded firearm is not an assault because the perpetrator

Additionally, Adams’s purported lack of fear when Brown pointed the firearm at him does not support a different conclusion. The victim’s fear is not an element of assault. (*People v. Griggs* (1989) 216 Cal.App.3d 734, 742.) Even if Adam’s lack of fear could be reasonably reconciled with a finding of Brown’s innocence, reversal of the judgment is not warranted under the sufficiency of evidence standard of review. (See *Jennings, supra*, 50 Cal.4th at pp. 638–639.)

b. Great Bodily Injury Enhancement

Brown next argues that substantial evidence does not support the great bodily injury enhancement because she did not personally inflict the injury to Adams. Specifically, Brown claims that because her shot initially struck the ground and then ricocheted into Adams’s leg, she is only the proximate cause of Adam’s injury, rather than its direct cause.

Subdivision (a) of section 12022.7 is a sentencing enhancement for a defendant “who personally inflicts great bodily injury on any person . . . in the commission of a felony or attempted felony.” (§ 12022.7, subd. (a).) To “personally inflict” the injury, the actor must be “‘the direct, rather than [the] proximate, cause of the victim’s injuries.’” (*People v. Elder* (2014) 227 Cal.App.4th 411, 418; *People v. Warwick* (2010) 182 Cal.App.4th 788, 793 (*Warwick*).) Courts have adopted the nonlegal meaning for the phrase “‘personally inflicts’” injury. (*People v. Cross* (2008) 45 Cal.4th 58, 68.) Specifically, the phrase

would lack the requisite present ability to commit violent injury. (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3.) However, the firearm pointed at Adams by Brown was loaded, as demonstrated by the discharge of two rounds from it.

means that the actor “directly and not through an intermediary, ‘cause[s] something (damaging or painful) to be endured.’” (*Ibid.*; *Warwick*, at p. 794; *People v. Slough* (2017) 11 Cal.App.5th 419, 423.)

We reject Brown’s argument that she was only indirectly responsible for Adams’s injury. Brown’s volitional act of shooting the firearm caused the bullet to discharge from the firearm. The same bullet struck Adams in the leg, causing the injury. There is no distinction in the injury caused by the ricochet of the bullet fired by Brown and an injury caused by a bullet directly striking Adams without the ricochet. Both would directly cause the injury. These circumstances sufficiently support the enhancement that Brown directly and personally inflicted the injury.

2. *Sentencing on the Firearm Enhancement*

Brown alternatively seeks remand for resentencing on the firearm enhancement in light of Senate Bill No. 620. Effective January 1, 2018, the Legislature amended section 12022.5, subdivision (c) to allow a court to exercise its discretion under section 1385 to strike or dismiss the personal use of a firearm enhancement at the time of sentencing. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 1.) Prior to Senate Bill 620, trial courts had no discretion to strike firearm enhancements under sections 12022.5.

A trial court’s refusal or failure to dismiss an allegation pursuant to section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) The defendant must affirmatively demonstrate that the trial court misunderstood its sentencing discretion. (*People v. Lee* (2017) 16 Cal.App.5th 861, 866 (*Lee*); *People v. Davis* (1996) 50 Cal.App.4th

168, 172 (*Davis*).) Unless the defendant clearly shows that a sentencing decision was irrational or arbitrary, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978; *Lee*, at p. 866.)

When the record shows that the trial court proceeded with sentencing on the incorrect assumption it lacked discretion, remand is required so that the trial court may have the opportunity to exercise its discretion at a new sentencing hearing. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228; *Lee, supra*, 16 Cal.App.5th at pp. 866–867.) However, if the record is silent, we presume that the trial court was aware of the applicable law, including statutory discretion at sentencing. (*Lee*, at p. 867; *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527; *People v. Mosley* (1997) 53 Cal.App.4th 489, 499 (*Mosley*); *Davis, supra*, 50 Cal.App.4th at p. 172.) We cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of that discretion. (*Mosley*, at p. 496; *Davis*, at p.172; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523; *Brown*, at p. 1229.)

The trial court sentenced Brown on June 14, 2018. Thus, by that date, Senate Bill No. 620 had been part of the legal landscape for over five months. We presume the parties, including the trial court, were aware of Senate Bill No. 620 and its newly granted discretion to strike firearm enhancements when Brown was sentenced. (See *Mosley, supra*, 53 Cal.App.4th at p. 499 (sentencing court’s awareness of authority to strike

prior strike convictions presumed where *Romero*⁴ decision was filed 53 days earlier).) This is not a case where a law that ameliorates punishment was passed after the defendant was sentenced.

The trial court's statements at sentencing do not affirmatively show that it misunderstood, or otherwise failed to exercise, its discretion in striking the firearm enhancement. The trial court's imposition of the low term on the firearm enhancement was not a comment of the extent of its possible discretion. It was the trial court's selection from the triad of options. Accordingly, because the trial court's statements do not indicate that it was unaware of its authority to strike the enhancement, Brown has failed to meet her burden of proving error.

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISPOSITION

The judgment is affirmed.

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HANASONO, J.*

We concur:

EDMON, P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.